



2020

## Mass Arbitration

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## **Abstract**

### **Mass Arbitration**

The Supreme Court's interpretation of the Federal Arbitration Act in a series of recent cases makes clear that arbitration agreements contained in contracts of adhesion will be enforced according to their terms. Some of the terms in various arbitration agreements appear "friendly" to claimants and to arbitration. Of course, such "arbitration-friendly" provisions were not actually intended to facilitate arbitration; they were intended to fend off challenges that the agreements' terms were unconscionable. These terms included, in virtually every arbitration agreement, a prohibition of class-wide arbitration. As I have set forth in prior work, the true gambit of the arbitration agreements lies in that class-action prohibition—namely, the elimination of claiming, and therefore, the elimination of legal liability. And in the wake of the Court's arbitration decisions, the claim-elimination strategy has been largely realized, leaving regulatory gaps across the swath of the legal landscape.

Perhaps second only to nature, however, the adversarial system abhors a vacuum. The decades long march toward enforcing arbitration agreements "according to their terms" reached its apotheosis in 2013 with *American Express v. Italian Colors*, in which the Supreme Court repeated this mantra, and the dire consequences for claiming were just "too darn bad." Since then, I have told my students that the arbitration provisions were ripe for one-on-one, mass arbitration picking. With a little entrepreneurial spirit, a fair bit of capital, and a willingness to take the Supreme Court at its literal word that the purpose of its FAA jurisprudence is to encourage arbitration, I argued, the opportunity for arbitration *en masse* was waiting.

Now, behold, I have seen it done. With entrepreneurial spirit, more than a fair bit of capital, and the repeated quoting of the Supreme Court's literal words about the FAA's purpose of facilitating arbitration, a new, well-capitalized, plaintiffs' firm has taken critical steps toward vindicating the claims of thousands employees through mass arbitration. Other firms will almost assuredly follow. Attacks on mass arbitration have been swift but short on merit-based arguments. Defendants' don't contest the substantive merit of the claims, which by all accounts seem quite valid; instead, defendants have attacked the practice of mass arbitration itself on ethical and procedural grounds. The takeaway: Plaintiffs attorneys are onto something.

The genesis of mass arbitration turns the defendants' arbitration gambit on its head, which is more than a bit ironic. First, mass arbitration transforms the fiction that these clauses would facilitate arbitration—a fiction intentionally perpetuated by contract drafters, a fiction understood by the Supreme Court—into reality. And it does so with the help of the very "friendly" provisions that contract drafters included to make their agreements appear (but *only* appear) arbitration facilitative. Second, mass arbitration makes the much-maligned class action suddenly less dreadful, perhaps even attractive, to the corporations that went to such great lengths to eliminate it. Before mass arbitration, given the choice between a class action (and likely settlement) and arbitration agreements that functionally eliminated all but a handful of claims, corporations in virtually every industry were naturally on board with option B. However, mass arbitration creates a different set of choices. When arbitration is real, Option B actually requires

the resolution of multiple claims, on an individualized basis. This variation on Option B—*real* arbitration—is what now looks rather dreadful to these industries; suddenly, resolution of claims in an aggregate way through, say, a class action, looks better and better.

No doubt the drafters of these arbitration agreements will vigorously defend the deregulatory gains that those agreements originally achieved—gains that save companies millions and often shield them from liability for wrongdoing. No doubt these same corporations will reconsider the contents of their arbitration agreements and likely retreat to less “friendly” versions, carefully tailored to survive the scrutiny of the unconscionability doctrine. No doubt the pendulum of the adversarial system will, as ever, swing back and forth between the plaintiffs and defense bar.

The inevitability of the battle does not, however, diminish the important regulatory implications of nascent mass arbitration. First, mass arbitration holds promise to provide more cost-effective, efficient claim resolution for countless individuals subject to contracts of adhesion. Indeed, it was never the reality of arbitration that was the problem for claimants; it was the fiction of it. By extension, mass arbitration also holds promise to breathe new life into substantive legal obligations that ubiquitous arbitration agreements had all but eliminated in practice. Second, mass arbitration forces us to consider afresh the procedural, constitutional, and ethical challenges to resolving mass harm. Third, if (when?) mass arbitration is beaten back by its very creators, mass arbitration requires us to reconsider old arrangements; indeed, mass arbitration may well lead us right back into the waiting arms of that old and rejected standby, the class action.

This Article will proceed in three parts. Part I will briefly trace the Supreme Court’s recent arbitration jurisprudence as well as provides an overview of both the evolution and current empirical data regarding the content of arbitration agreements in contracts of adhesion. Part II will provide an account of the ways in which these seemingly impenetrable arbitration agreements were nonetheless vulnerable to actually being used in an individualized, but aggregated, fashion. In so doing, Part II situates these arbitration agreements within the broader context of a decades-long battle to facilitate claiming through aggregate mechanisms on the one hand and to eliminate it through the destruction of those mechanisms on the other. Part III provides an account of the new mass arbitration practice, as well as the procedural and ethical attacks launched against it. Part III then explores both the regulatory promise of mass arbitration vis-à-vis the effectuation of the substantive law and the interplay between familiar challenges to the aggregate resolution of claims and this new, unfamiliar aggregate setting. This analysis has important implications for numerous ongoing debates about aggregate resolution of claims as well as the role of private enforcement in regulating wrongdoing.